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Schultz v. State Petition For Review Dckt. 40353

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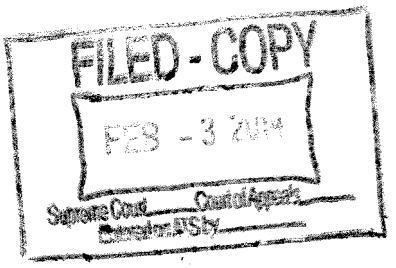


IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

WALLY KAY SCHULTZ,	)	
	)	Supreme Court No. 40353-2012
Petitioner/Appellant,	)	
	)	District Court No. CV-11-662
vs.	)	
	)	BRIEF IN SUPPORT OF
STATE OF IDAHO,	)	PETITION FOR REVIEW
	)	
Respondent.	)	

* * * * *

COMES NOW, Petitioner Wally Kay Schultz ("Schultz"), by and through his attorneys of record, Fuller Law Offices, and hereby submits the following Brief in Support of Petition for Review of the Idaho Court of Appeals' Decision filed in *Wally Kay Schultz v. State of Idaho* on December 30, 2013, pursuant to Idaho Appellate Rule 118.

Schultz alleges that the Idaho Court of Appeals' Decision has decided a question

of substance not heretofore determined by the Supreme Court, has decided a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court or of the United States Supreme Court, and has rendered a decision in conflict with a previous decision of the Court of Appeals.

ARGUMENT

On or about August 3, 2006, Appellant, Wally Kay Schultz, (hereinafter referred to as "Schultz"), was charged with Possession of a Controlled Substance, as is set forth in Case No. CR-2006-2718, in the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka. Said case was set for trial at a later date, which was vacated because of a guilty plea entered by Schultz on or about June 4, 2007.

Schultz was later sentenced on August 13, 2007, to a unified sentence of five (5) years, which unified sentence was comprised of a minimum (fixed) period of confinement of five (5) years, followed by an indeterminate period of custody of 0 years. Schultz received credit for time served in the amount of 376 days. (R. pp. 118-124.)

Subsequent to the above proceedings, on or about June 16, 2011, Schultz received from the Offices of the State Appellate Public Defender a letter, including copies of four Memoranda sent out by the Idaho State Police, which indicate that as early as 2003, certain improprieties occurred in at least one of the State's forensic laboratories. (R. pp. 9-15.) One of the Memoranda indicated that on February 24, 2011, ISP Captain Clark Rollins received an Idaho State Police Administrative Incident Report from ISP Lab Improvement Manager, Matthew Gamette, regarding Skyler Anderson. Gamette evidently alleged that Mr. Anderson maintained an ongoing unauthorized quantity of

controlled substances and other chemicals for display purposes, outside the practices of the forensics quality manual, without proper documentation, tracking and auditing. During yearly audits of the Region V lab facility, Mr. Anderson and others intentionally hid the unauthorized "display drugs" and other chemicals from auditors to avoid detection of this practice. Mr. Anderson personally hid the drugs from auditors on at least four (4) occasions. (R. p. 138.)

Mr. Anderson's conduct was succinctly stated by Colonel G. Jerry Russell, Director, Idaho State Police, in correspondence dated May 11, 2011, to William Lloyd Mauk,

> "Mr. Anderson was complicit over a period of years in deliberately hiding a box of "show and tell" drugs kept at the ISP Forensic Lab in Pocatello. I understand that this was part of the training he received from now former Region 5 lab employees, Don Wyckoff and Rockland McDowell, who apparently justified to him as the box being kept as "reference" materials that would cost money to order from supply companies. Mr. Anderson's direct participation in the activity concerning this box appears to have ended in 2008 when he was transferred to toxicology, at which point he ceased having any direct connection to it. After reading an article that Region 5 Lab Manager Shannon Larson sent to Mr. Anderson in 2011, and knowing that the existence of the unauthorized box could have a negative effect on the lab's accreditation, Mr. Anderson reported the existence of the box to Ms. Larson. Until this disclosure to Ms. Larson, this box and its contents were kept secreted and hidden from auditors. Mr. Anderson himself hid this box and its contents on at least four occasions, and he instructed at least one other lab employee to do the same.
>
> As set forth in the Notice of contemplated Disciplinary Action dated April 27, 2011, there are very serious consequences of Mr. Anderson's actions that I must consider. First, since he deliberately hid the box of "show and tell" drugs from lab auditors, numerous times and over a period of years, I have no choice but to view his actions as repeated purposeful deception. Second, Mr. Anderson's actions may have caused serious damage to Region 5 Lab's reputation, and may have even called into question the accuracy and integrity of the entire ISP Forensic Lab program. Surely Mr.

> Anderson appreciates the devastation to the Idaho criminal justice system should that happen. Third, Mr. Anderson's actions could have an adverse effect on Region 5's lab accreditation. He should be acutely aware of this, given that he is an ASCLD/LAB (American Society of Crime Laboratory Directors/Laboratory Accreditation Board) auditor.

(Please see Exhibit "B".)

Schultz filed a Petition, Affidavit for Post Conviction Relief and Motion and Affidavit in Support of Appointment of Counsel, on or about the 2nd day of August, 2011, alleging, among other things, that there existed newly discovered evidence that would justify post conviction relief in this matter. (R. p. 1-25.)

A hearing was conducted on or about June 25, 2012, relative to all pending motions, and Exhibit A and Office of Professional Standards Administrative Investigation Packet as Exhibit B were introduced as evidence. (R. pp 191-192.)

That the Court issued an Order Regarding All Pending Motions and Judgment of Dismissal on or about the 11th day of July, 2012. (R. pp. 194-204.) On or about July 25, 2012, Schultz filed a Motion for Reconsideration. (R. pp. 205-213.) The State filed an Objection to Motion for Reconsideration on or about August 7, 2012. (R. pp. 214-216.) On or about the 10th day of August, 2012, the Court entered an Order Denying the Petitioner's Motion for Reconsideration. (R. pp. 217-224.)

Schultz filed a Notice of Appeal on or about the 20th day of September, 2012. (R. pp. 225-227.) The Idaho Supreme Court issued an Order Remanding to District Court on or about the 24th day of September, 2012. (R. p. 228.) The Court issued a Judgment on or about the 28th day of September, 2012. (R. p. 229.) Schultz then filed an Amended Notice of Appeal on or about October 5, 2012. (R. pp. 230-233.) Schultz appeal was

denied on December 30, 2013.

In the Court of Appeals' Decision the Court notes primarily that:

1. Schultz acknowledged that the undisclosed information was impeachment evidence, and;

2. Pursuant to *Ruiz*, the State had no obligation to disclose the information before Schultz pled guilty, and;

3. Schultz relies on *Giglio v. United States*, 405 U.S. 150 (1972). In *Giglio*, the United States Supreme Court held that failure to disclose impeachment evidence is a potential source of a *Brady* violation in a trial setting. *Giglio*, 405 U.S. at 153-54. However, *Giglio's* application is limited by the United States Supreme Court decision in *Ruiz*. There the Court specifically considered exculpatory impeachment evidence, which Schultz attempts to rely on:

> The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material--a right that the Constitution provides as part of its basic "fair trial" guarantee. . . . *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").
>
> *Ruiz*, 536 U.S. at 628 .
>
> The Court then distinguished the constitutional guarantee to receive impeachment evidence at trial from receiving it before pleading guilty and held that the State does not have the same obligation to disclose where a defendant pleads guilty. *Id.* at 628-33. Characterizing the undisclosed evidence as exculpatory impeachment evidence does not bring Schultz outside the parameters of *Ruiz*. The Constitution simply does not require the government to disclose "material impeachment evidence" prior to entering a plea agreement with a criminal defendant. *Id.* at 633.

The District Court in its Order stated that "impeachment evidence "is special in relation to the *fairness of a trial* not in respect to whether a plea is *voluntary*." *Dunlap v.*

State, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004) (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002)) (emphasis in original). It should be noted that *Dunlap* goes on to state

> "[i]mpeachment evidence should be viewed in the same manner as exculpatory evidence." *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); *Pizzuto v. State*, 134 Idaho 793, 796, 10 P.3d 742, 745 (2000).
>
> As the District Court has previously noted, "...the United States Constitution does not require the State to disclose material impeachment information prior to entering a plea agreement with the defendant. *United States v. Ruiz*, 536 U.S. 622, 629, 633, 122 S.Ct. 2450, 2455, 2457, 153 L.Ed.2d 586, 595, 597 (2002)."

However, in *State v. Gardner*, 126 Idaho 428, 885 P.2d 1144 (App. 1994), the Court stated as follows:

> The State also contends that a defendant is entitled to assert a *Brady* violation only if the defendant's conviction followed a trial and not if the defendant pleaded guilty. This argument is misplaced, for this Court has previously held that grounds for withdrawal of a guilty plea were shown where material, exculpatory evidence known to the State had been withheld from the defendant. *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct.App. 1991).[fn6] Although the United States Supreme Court's decisions have articulated the prosecutor's disclosure obligation as one essential to ensure a fair trial, *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-1197; *Agurs*, 427 U.S. at 108, 96 S.Ct. at 2399-2400, the underlying policy expressed by these opinions — to uncover truth and ensure that only the guilty are convicted — applies as well where a guilty plea was entered in ignorance of material, exculpatory information possessed by the prosecution. In *Bagley*, the Supreme Court observed that the purpose of the *Brady* rule is "to ensure that a miscarriage of justice does not occur," *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379-3380, and in *Agurs*, the Court stated:
>
> [T]hough the attorney for the sovereign must prosecute the

> accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Agurs, 427 U.S. at 110-11, 96 S.Ct. at 2401, *quoting Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). As to the risk of conviction of the innocent by guilty pleas, the Supreme Court has stated, "This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed.2d 747 (1970).[fn7] In light of these pronouncements of the Supreme Court, we see no reason to depart from our decision in *Johnson*, which allows relief for violations of the prosecutorial obligation of disclosure in appropriate circumstances where the conviction was entered upon a guilty plea.

The validity of a guilty plea is determined by reference to whether it was voluntary, knowing and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Brady v. United States*, 397 U.S. at 748, 90 S.Ct. at 1468-1469; *Carrasco*, 117 Idaho at 398, 787 P.2d at 284; *State v. Rose*, 122 Idaho 555, 558, 835 P.2d 1366, 1369. This entails an inquiry as to whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront adverse witnesses and to refrain from self-incrimination; and whether the defendant understood the consequences of pleading guilty. *Carrasco*, 117 Idaho at 298, 787 P.2d at 284. Thus, to satisfy constitutional standards, a guilty plea must not only be voluntary but must be "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. at 748, 90 S.Ct. at 1469. It also must not be a product of "misrepresentation or other impermissible conduct by state agents." *Id.*, 397 U.S. at 757, 90 S.Ct. at 1473. Where misconduct by the state keeps a defendant and his attorney unaware of circumstances tending to negate the defendant's guilt or to reduce his culpability, a guilty plea entered in ignorance of those facts may not be knowing and intelligent though it is otherwise voluntary. Accordingly, a *Brady v. Maryland* violation may warrant setting aside a guilty plea where the violation calls into question the accuracy of the adjudication of guilt.

. . .

> In the vast majority of cases, when defendants plead guilty they know full well whether they in fact committed the offense. If information withheld by the State relates to a fact that was within the defendant's knowledge and that he admitted when the plea was entered, the discovery of a *Brady* violation ought not enable the defendant to contest that which he has already openly admitted. In such circumstances, a violation of the prosecution's obligation of disclosure does not compromise the truth or risk conviction of the innocent. Therefore, it is essential to determine whether the defendant's admissions at the plea hearing fully established his factual guilt.
>
> The inquiry into the effect of the undisclosed evidence on the plea decision as discussed in *White* is essentially the same as an assessment of the materiality of the evidence. The *Brady* principle is violated only if the evidence withheld by the state is both exculpatory and material. *Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Agurs*, 427 U.S. at 107-113, 96 S.Ct. at 2399-2402; *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-1197. "Materiality" for purposes of evaluating a claimed *Brady* violation is defined in *Bagley:*
>
> > The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383.
>
> On a *Brady* challenge to a guilty plea, the test of materiality is whether there is a reasonable probability that, but for the state's failure to produce the information, the defendant would not have entered the plea but instead would have insisted on going to trial.[fn9] *Miller v. Angliker*, 848 F.2d 1312, 1322 (2d Cir. 1988). This is not a subjective investigation into what the particular defendant and his counsel actually would have decided, but an objective assessment, based in part upon the persuasiveness of the withheld information. *Id. See also Hill v. Lockhart*, 474 U.S. at 59-60, 106 S.Ct. at 370-371.

Schultz would invoke the doctrine set forth in *Gardner* and *Dunlap* and ask the Court to determine whether or not there is a reasonable probability, but for the State's failure to produce the information, Schultz would not have entered the plea but instead would have insisted on going to trial. This is an objective assessment, based in part upon the part of the persuasiveness of the withheld information. At oral argument before the

Court of Appeals, both counsel asserted that the objective assessment set forth above was to be the ultimate decision presented to the Court of Appeals and yet their decision does not even reference *Gardener*.

In *United States v. Ruiz,* 536 U.S. 622 (2002), the Court stated as follows:

> When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see also *Boykin*, *supra*, at 242.

Schultz would assert that his plea of guilt was not knowing, voluntary and intelligent given the persuasiveness of the withheld information. Where misconduct by the State keeps a defendant and his attorney unaware of circumstances tending to negate the defendant's guilt or to reduce his culpability, a guilty plea entered in ignorance of those facts may not be knowing and intelligent, though it is otherwise voluntary. Therefore, a *Brady* violation may warrant setting aside a guilty plea where the violation calls into question the accuracy of the adjudication of guilt. *Gardner* at 434.

Further, Schultz specifically requests that this Court find that the evidence introduced is exculpatory evidence. In *Giglio*, the Court held that "exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence"". *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972)

Schultz contends that the evidence presented to the District Court is, in fact,

impeachment evidence *and* exculpatory evidence. As set forth above, exculpatory evidence includes impeachment evidence where the witness' reliability is likely determinative of guilt or innocence. Obviously, in any possession of controlled substances case, the forensic scientist' testimony *will* determine guilt or innocence. Hypothetically speaking, upon an examination of the Idaho Criminal Jury Instructions, a defendant could meet every single element contained in those instructions for the charge of possession of controlled substances, with the exception of the determination that the substance was, in fact, a controlled substance, and not be guilty of the charge. It is not sufficient to sustain a conviction for possession of a controlled substance where the substance is *not*, in fact, a controlled substance. The only witness that can satisfy this requirement is a forensic scientist, duly qualified, who can reliably report test results. There can be no other way. Therefore, *this witness' testimony is determinative of guilt or innocence.*

In addition, the evidence is exculpatory for several other reasons. First, according to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), the testing procedures utilized in a criminal proceeding should be in a form that is commonly accepted in the scientific community. As the Court is likely aware, analysis of controlled substances utilizes the Scientific Method. The Scientific Method requires a "controlled" environment. The evidence submitted at hearing clearly shows that a large quantity of controlled substances which had been unaccounted was being stored in the roof tiles of the laboratory. Given that there were no rules or regulations pertaining to the storage of those drugs, nor their handling, it is entirely possible that the entire forensic laboratory

was contaminated by the unaccounted for controlled substances. Further, the evidence clearly demonstrates that there were no set procedures concerning the amount of substance which was to be taken from each substance for testing purposes, there were no rules or regulations concerning the destruction of samples, nor were the forensic analysts being audited concerning their policies and procedures relating to the analysis of controlled substances. It is apparent that there was not a controlled environment existing at the time Schultz' drug sample was tested. The evidence introduced at hearing clearly demonstrates that said evidence is both impeaching and exculpatory.

CONCLUSION

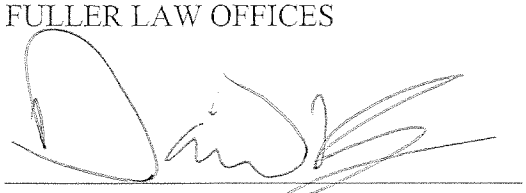
Schultz would request that the Court make a determination as to whether or not the test set forth in *Gardner* should have been utilized, i.e. "on a *Brady* challenge to a guilty plea, the test of materiality is whether there is a reasonable probability that, but for the state's failure to produce the information, the defendant would not have entered the plea but instead would have insisted on going to trial. *Miller v. Angliker*, 848 F.2d 1312, 1322 (2d Cir. 1988). This is not a subjective investigation into what the particular defendant and his counsel actually would have decided, but an objective assessment, based in part upon the persuasiveness of the withheld information. *Id. See also Hill v. Lockhart*, 474 U.S. at 59-60, 106 S.Ct. at 370-371."

It is difficult to imagine that had Schultz known of the findings made by the Idaho State Police, that he would have entered a plea of guilty. Schultz contends that an objective person would not have entered a plea of guilty, and would have instead taken the matter to a trial before a jury of his peers.

Therefore, Schultz requests that the Idaho Supreme Court review the decision issued in this matter and further requests that his plea of guilt be withdrawn and/or set aside and the conviction vacated.

DATED This 31st day of January, 2014.

FULLER LAW OFFICES



DANIEL S. BROWN
Attorney for Appellant

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 31 day of January, 2013, I caused two true and correct copies of the foregoing document to be mailed, United States Mail, postage pre-paid, to the following:

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Idaho Attorney General
P. O. Box 83720
Boise, ID 83720-0010